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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**

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7 JAMES WALKER; CHARLENE WALKER

Case No. 2:19-cv-00486-RFB-DJA

8 Plaintiff(s),

ORDER

9 v.

10 WELLS FARGO BANK, NATIONAL
11 ASSOCIATION

12 Defendant(s).

13 **I. INTRODUCTION**

14 Before the Court is Defendant Wells Fargo Bank, National Association's ("Wells Fargo")
15 Motion to Dismiss. ECF No. 13. For the following reasons, the Court grants the motion.
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17 **II. PROCEDURAL BACKGROUND**

18 Plaintiffs filed their complaint in the Eighth Judicial District Court of Clark County on
19 February 26, 2019. ECF No. 1. Plaintiffs filed a first and second, operative, amended complaint
20 on March 4, and March 14, 2019, respectively. Wells Fargo removed the case to federal court on
21 March 21, 2019. ECF No. 1. Wells Fargo filed its motion to dismiss on April 26, 2019. ECF No.
22 13. A response and reply were filed. ECF Nos. 14, 17.

23 **III. FACTUAL ALLEGATIONS**

24 Plaintiffs allege as follows in their complaint: Plaintiffs James and Charlene Walker are
25 married senior citizens who currently reside in Las Vegas and subsist on monthly Social Security
26 income of \$2127 and \$1171, respectively. The interest rate on their principal mortgage is 6.35%.
27 In the past, they have requested loan modifications with Wells Fargo but have been denied
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1 consecutively four times. In 2003, Plaintiffs established a home equity line of credit (HELOC)
2 with Wells Fargo for \$115,000. Plaintiffs then sought to consolidate their HELOC with their
3 principal mortgage payments so that they would only have one monthly payment. Wells Fargo
4 assured them that it would consolidate the payments. Wells Fargo approved another line of equity
5 for \$171,000 and promised to pay off the existing HELOC amount of \$110,000 through escrow,
6 and also to pay credit card payments of \$35,000. Plaintiffs now owe \$5,091.91 in monthly
7 payments on their principal mortgage, and two HELOC loans. Plaintiffs allege that Wells Fargo
8 suspended or reduced their home equity lines of credit, that Wells Fargo failed to provide required
9 disclosures, and that the HELOC loans have annual percentage rates (APRs) that exceed certain
10 thresholds permitted by the Homeownership and Protection Act (“HOEPA”). Plaintiffs also
11 allege that Wells Fargo never paid off the first HELOC as promised and instead kept both lines
12 of equity open and separate, causing Plaintiffs to make three monthly payments. Plaintiffs further
13 allege that the failure to consolidate the two HELOCs is causing Plaintiffs severe financial
14 pressure. The first HELOC has a balance of approximately \$108,000, with a monthly payment of
15 \$782.48, while the second HELOC has a balance of \$171,000 and a monthly payment of \$1073.00.
16 Plaintiffs have now paid approximately \$267,145.92 in combined payments on both HELOCs.
17 Plaintiffs had continuously maintained communications with Wells Fargo since July 2018 and
18 Wells Fargo promised some remedies including liquidation of Plaintiffs’ mortgage. But Plaintiffs
19 would appoint specialists to communicate with Plaintiffs who would frequently change and who
20 never finalized correspondence with Plaintiffs. Plaintiffs allege that Wells Fargo took advantage
21 of the lack of knowledge of Plaintiffs when it opened two parallel lines of home equity credit
22 without authorization or without telling the plaintiffs. In a letter Plaintiffs received in February
23 2019, Wells Fargo accepted that it made a “clerical error,” and did not close the first HELOC
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1 account, which exceeded Plaintiffs' credit limit when combined with the second HELOC. Wells
2 Fargo subsequently reduced Plaintiffs' access to the second HELOC so that Plaintiffs did not
3 continue to exceed their credit limit. Accordingly, Plaintiffs now bring breach of contract,
4 fraud/fraudulent concealment/fraudulent misrepresentation, negligent misrepresentation,
5 conversion, breach of fiduciary duty, negligence, violations of the HOEPA Act (15 U.S.C. §
6 1602(b)(B); § 1639); violation of Nevada's False Advertising Law (codified at Nev. Rev. Stat. §
7 207.175); and violations of Nevada's Deceptive Trade Practices Act (codified at Nev. Rev. Stat. §
8 598.0903) claims against Wells Fargo. Plaintiffs also seek declaratory relief against Wells Fargo
9 that Wells Fargo violated state and federal consumer laws.

12 **IV. LEGAL STANDARD**

13 An initial pleading must contain "a short and plain statement of the claim showing that the
14 pleader is entitled to relief." Fed. R. Civ. P. 8(a). The court may dismiss a complaint for "failure
15 to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In ruling on a motion
16 to dismiss, "[a]ll well-pleaded allegations of material fact in the complaint are accepted as true and
17 are construed in the light most favorable to the non-moving party." Faulkner v. ADT Sec. Services,
18 Inc., 706 F.3d 1017, 1019 (9th Cir. 2013) (citations omitted).

19 To survive a motion to dismiss, a complaint need not contain "detailed factual allegations,"
20 but it must do more than assert "labels and conclusions" or "a formulaic recitation of the elements
21 of a cause of action" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp.
22 v. Twombly, 550 U.S. 544, 555 (2007)). In other words, a claim will not be dismissed if it contains
23 "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face,"
24 meaning that the court can reasonably infer "that the defendant is liable for the misconduct
25 alleged." Id. at 678 (internal quotation and citation omitted). The Ninth Circuit, in elaborating on
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1 the pleading standard described in Twombly and Iqbal, has held that for a complaint to survive
2 dismissal, the plaintiff must allege non-conclusory facts that, together with reasonable inferences
3 from those facts, are “plausibly suggestive of a claim entitling the plaintiff to relief.” Moss v. U.S.
4 Secret Service, 572 F.3d 962, 969 (9th Cir. 2009).

6 V. DISCUSSION

7 Wells Fargo argues that Plaintiff’s claims are time-barred, and the Court agrees. The course
8 of events for which Plaintiffs seek relief involve consumer credit transactions. The last of these
9 transactions was the disbursement of the funds from the second HELOC, which occurred in July
10 2005¹. As Plaintiffs have now filed their complaint over thirteen years after the second HELOC’s
11 funds were disbursed, all of their claims are time-barred. See Nev. Rev. Stat. § 11.190(1)(b) (six
12 year limitations period for contracts in writing); Nev. Rev. Stat. § 11.190(3)(d)(three-year
13 limitations period for fraud); Nev. Rev. Stat. § 11.190 (4)(e) (two-year limitations period for
14 negligence); 15 U.S.C. § 1640(e) (one-year limitations period for HOEPA violations).

15 Plaintiffs argue that their claims should be subject to equitable tolling on the basis of the
16 discovery rule. The discovery rule permits courts to toll the statute of limitations until the injured
17 party discovers or reasonably should have discovered facts supporting the cause action. Bemis v.
18 Bemis, 967 P.2d 437, 440 (Nev. 1998); TwoRivers v. Lewis, 174 F.3d 987, 991 (9th Cir. 1999).
19 In order for a court to find that the discovery rule tolls the statute of limitations, a party must
20 demonstrate that they exercised due or reasonable diligence in discovery of the cause of action.
21 Bemis, 967 P.2d at 440; Bibeau v. Pac. Northwest Research Foundation Inc., 188 F.3d 1105, 1107
22 (9th Cir. 1999). Plaintiffs argue that whether they exercised due diligence is a question of fact for
23 which a full hearing is required. But Plaintiffs have failed to allege any facts at all in their
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25 ¹ To support its motion to dismiss, Wells Fargo attached extrinsic documents, including what it informed the
26 Court were the original deed of trust, first loan modification and second loan modification. However, Wells Fargo
27 appears to have submitted only the original deed of trust and mislabeled the other documents in error. The Court will
28 take judicial notice of the original deed of trust, as neither party disputes its authenticity and it is a public record. Lee
v. City of Los Angeles, 250 F.3d 668, 688–89 (9th Cir. 2001). The Court will also take judicial notice of the documents
Plaintiffs attach in their opposition to Wells Fargo’s motion, which include the July 2005 disbursement documents.
Although not attached to the complaint, the documents are documents on which Plaintiffs would have necessarily
relied in drafting the complaint and the authenticity of which Wells Fargo does not dispute. Id.

1 complaint that support a finding that they were due diligent. Plaintiffs fail to explain why, if funds
2 on the second HELOC were disbursed in July 2005, they waited until 2019 to sue Wells Fargo for
3 its alleged violations of federal and state law in refusing to consolidate the two HELOCs as
4 requested. Accordingly, the Court finds that the discovery rule cannot apply to equitably toll
5 Plaintiffs' claims.

6 Plaintiffs also argue they should receive equitable tolling on the basis of the continuing
7 violation doctrine. But the Ninth Circuit has already held that the continuing violation doctrine is
8 inapplicable to Truth in Lending Act claims (of which HOEPA claims are a subsection) that are
9 based on a failure to disclose. King v. State of Cal., 784 F.2d 910, 914 (9th Cir. 1986). The Nevada
10 Supreme Court has also never held that the continuing violation doctrines applies to any of the
11 state law claims Plaintiffs bring in this suit. The Court therefore rejects any basis to apply equitable
12 tolling under a continuing violation theory.

13 Plaintiffs next argue that their claims should be equitably tolled on the basis of fraudulent
14 concealment. In King v. State of Cal., the Ninth Circuit held that equitable tolling on the basis of
15 fraudulent concealment could apply to Truth in Lending Act Claims. King, 784 F.2d at 915. As
16 the Ninth Circuit explained in a different case, "the accrual doctrine for a discovery rule is
17 conceptually distinct from the equitable tolling doctrine in fraudulent concealment cases." Hexel
18 Corp. v. Ineos Polymers, Inc., 681 F.3d 1055, 1062 (9th Cir. 2012). Unlike the discovery rule,
19 which focuses on when the plaintiff became aware of or should have become aware of the facts
20 giving rise to a cause of action, fraudulent concealment focuses on the actions of the defendant
21 that are calculated to prevent the plaintiff from filing suit within the limitations period. Id. at 1062.
22 Again, Plaintiffs cite plenty of caselaw but identify no facts alleged in the complaint that support
23 a finding that Wells Fargo fraudulently concealed information that prevented Plaintiffs from bring
24 their claims earlier. This is particularly troublesome for Plaintiffs because a claim of fraudulent
25 concealment is subject to the heightened pleading standards of Rule 9b of the Federal Rules of
26 Civil Procedure. Fed. R. Civ. P. 9(b). Plaintiffs allege in their complaint that they received
27 voluminous paperwork that concealed Wells Fargo's wrongdoing, but Plaintiffs have not
28 adequately identified *what specific* wrongdoing was concealed. The disbursement proceeds for the

1 second HELOC were made available in July 2005. Plaintiffs allege in their complaint that they
2 have been making three monthly payments, rather than one consolidated monthly payment. Based
3 on these facts, Plaintiffs cannot plausibly plead that they did not know that Wells Fargo had not
4 consolidated the HELOCs as requested until 2019.

5 Finally, Plaintiffs argue for equitable estoppel to apply in this case. Unlike the discovery
6 rule or equitable tolling, “equitable estoppel applies when a plaintiff who knows of his cause of
7 action reasonably relies on the defendant’s statements or conduct in failing to bring suit.” Stitt v.
8 Williams, 919 F.2d 516, 522 (9th Cir. 1990). Again, the Court finds that Plaintiffs plead no facts
9 demonstrating that Plaintiff reasonably relied on Wells Fargo’s statements or conduct that then
10 prevented Plaintiffs from timely filing their claims. Accordingly, the Court does not find any basis
11 with which to toll the statute of limitations in this case and dismisses all of Plaintiffs’ claims as
12 time-barred.

13 **VI. CONCLUSION**

14 **IT IS THEREFORE ORDERED** that Defendant Wells Fargo, N.A.’s Motion to Dismiss
15 (ECF No. 13) is GRANTED.

16 The Clerk of the Court is instructed to close the case.

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18 DATED April 1, 2020.

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21 **RICHARD F. BOULWARE, II**
22 **UNITED STATES DISTRICT JUDGE**
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